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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARK A. THOMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA

On Petition For A Writ of Certiorari To The United States Court Of Military Appeals

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

HOMER A. WALKUP
Attorney at Law
2501 Ridge Road Drive
Alexandria, VA 22302
(703) 836-8281

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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1. The Brief in Opposition misstates the position of the Petitioner, both in the statement of "Questions Presented" and at the outset of the "Argument," page 4. Petitioner does not contend that military appellate courts must "issue opinions fully articulating the reasons underlying their disposition of each error assigned or issue presented on appeal." The questions presented by the petition instead relates to whether military appellate courts may "fail to decide specifically on the record issues of violations of rights and immunities guaranteed under the Constitution of the

United States which, in a brief timely filed on behalf of a person convicted upon trial before a general court-martial, are asserted as having denied such person a lawful trial and as having resulted in such person's being erroneously convicted of infamous offenses and sentenced. . . to. . . years confinement at hard labor. . ." It will be seen that the questions actually presented by the Petitioner delimit the situations in which articulation of reasoning of military appellate courts would be required. *United States* v. *Augenblick*, 393 U.S. 348 (1969), indicates that "errors rising to the constitutional level" amount to something more than a failure to comply with a federal statutory requirement, in a situation in which it appears improbable that compliance would have affected the outcome. The "Questions Presented," as actually stated at the outset in the Petition, posit a situation involving: (a) trial before a *general* court-martial, which excludes the great mass of military cases handled by lesser *special* and *summary* courts-martial. (b) conviction of *infamous* offenses, as contemplated by the Fifth Amendment. (c) a sentence including confinement at hard labor for a period of years, hence involving substantial deprivation of liberty. The number of military cases which will meet all of the stated conditions is small. That number will be reduced still further by the exclusion, for reasons of practicality, of situations which call for a high order of military expertise for accurate resolution of issues presented.

2. A case such as that of the Petitioner is statutorily required to be referred to a Court of Military Review. In such a case, § 866(c) of Title 10, U.S. Code, explicitly provides that the Court of Military Review, "*may* affirm *only* such findings of guilty and

the sentence or such part or amount of the sentence, as it finds *correct in law and fact* and determines, on the basis of the entire record, *should* be approved. . ." (italics for emphasis supplied). The following § 867, in subsection (d), defining and governing the operations of the civilian Court of Military Appeals, limits the action of that Court to matters of law, and to the findings and sentence "as affirmed or set aside as incorrect *in law*" [italics supplied] by the Court of Military Review. The case of Petitioner presented briefed issues respecting search and seizure and suggestive influence upon eyewitness identification, concerning which issues—as arising in varied factual situations—much has been written, and differing opinions expressed, by learned Justices of this Court. Is it conceivable that the Congress in 1950—in enacting a reformed military justice system, a prime announced objective of which was to reduce the control exercised by lay military commanders over courts-martial—intended that the final word as to such issues of law when presented in a case tried in the Armed Forces, should be that of a group of lay military officers appointed *ad hoc* to additional duty as members of a court-martial, whose future careers are under the control of the military commander who ordered the proceeding? The realities of the situation are patent: The judgment of the military commander (and of those who advised him) in ordering the trial is at stake, and a subordinate officer whose action is necessarily impeaching that judgment need have a supporting record which clearly demonstrates on its face that no alternative course was avaliable. There is in the military situation no anonymous juror who can return to his home after the trial and remain ever after accountable only to his own conscience.

3. The Brief in Opposition at the outset animadverts Petitioner's not having cited authority. Statutes and regulations set forth in the petition, considered against the background of the well-known general military situation, provide all material needed at this juncture for an understanding of the plight of the Petitioner and the relief sought by him. Rule 21.1.(j) of the Rules of this Court limit a petition for certiorari to, "A direct and concise argument amplifying the reasons relied on for the allowance of the writ," and Rule 21.3 states: "No separate brief in support of a petition for a writ of certiorari will be received, and the Clerk will refuse to file any petition for a writ of certiorari to which is annexed or appended any supporting brief." Petitioner hopes that the thirst for authority may be somewhat slaked, while avoiding the strictures of Rule 21.3, by a brief quotation from the *Code Napoleon* (March 15, 1803), Preliminary Title, Article the First, paragraphs 4. and 5.:

> 4. The judge who shall refuse to give judgment under pretext of the silence, obscurity, or insufficiency of the law, may be prosecuted as guilty of denying justice.
>
> 5. It is forbidden to judges to pronounce by way of general and regulatory ordinance,* upon the causes brought before them.
>
> * *Par voie de disposition generale et reglementaire*

4. On page 6 of the Brief in Opposition, *Taylor* v. *McKeithen*, 407 U.S. 191 (1972), is cited for the proposition that federal courts are not required to render opinions in support of their decisions. The actual holding of six Justices in that case was that a Fifth Circuit

Court of Appeals judgment, rendered without supporting opinion, would be vacated, and the cause remanded. Five Justices concurred in a per curiam opinion holding that the record was not fully informative as to the precise nature of the litigation, and the Supreme Court did not have the benefit of the insight of the Court of Appeals. Three Justices dissented on the ground that the length and content of opinions are best left to the discretion of the judges making decisions, and the five Justices concurring in the per curiam opinion, in a footnote recognized such as being the general rule. The case concerned reapportionment in Louisiana, including an area embracing a portion of the City of New Orleans, and the Court of Appeals had reversed a plan, as drawn by a Master of the District Court, in favor of an alternative plan presented by the Attorney General of Louisiana. It was not indicated whether the above-quoted provisions of the *Code Napoleon* continued in effect in Louisiana or entered into the discussion of the *Taylor* case. Suffice it to say in the instant connection, that the case of the Petitioner involves no such political thicket as reapportionment; that the statutes governing military appellate courts differ in terms and background from those applying to Article III courts; *Taylor* does not appear to have presented any situation wherein any individual had languished in confinement for years under a conviction seriously challenged as to its constitutional validity; and no basic Bill of Rights issue seems to have been presented in that case.

5. Quoting from page 6 of the Brief in Opposition:

> In the instant case, there is no reason to believe that the Court of Military Review failed to consider all six issues presented by petitioner. In fact, the court specifically stated (Pet. App. 11a) that it had considered the assigned errors and found them to be without merit.

The foregoing "adequate assurance that the Court of Military Review had examined the entire record and all of the issues raised on . . . [Petitioner's] . . . behalf" does not satisfy counsel for Petitioner, much less the Petitioner himself in his cell at Fort Leavenworth. For those who are thus satisfied, it would seem to be a modest proposal, considering constraints both imposed and threatened by the Balanced Budget and Emergency Deficit Control Act of 1985, that Courts of Military Review be replaced by much less expensive word processing equipment which would endorse upon court-martial records, "The Court has considered the assigned errors and found them to be without merit."

6. Regarding the second question presented, as to the obligation imposed upon the civilian Court of Military Appeals in the case of the Petitioner, it should be noted that the Court of Military Appeals, in considering a petition for grant of review, has before it the complete court-martial record, not simply the petition, supplemented by assignments of error, and answers to such assignments. In the case of Petitioner, the Court of Military Appeals had before it for a period of over twenty months the complete record; supplemented petition for grant of review; a petition for new trial; brief in support of petition for new trial; and answers of the Government to both petitions. Review was granted only as to a trivial issue of multiplicity of specifications; separate speci-

fications alleging conspiracy were consolidated; and no change was indicated as to the sentence. The petition for new trial was denied, approximately one month after the foregoing action, without explanation of the rationale. The supplement to the petition for grant of review specifically assigned as asserted error the failure of the Court of Military Review to treat specifically the constitutional issues of unlawful search and seizure and unduly suggestive eyewitness identification. Whatever might have been the action of a federal Circuit Court of Appeals in the same situation (the offenses of which Petitioner now stands convicted could as well have been charged and tried in a United States District Court), and whatever might have been the action of this Court in the exercise of its supervisory role, the Court of Military Appeals operates under a more explicit statutory authority and is limited to consideration of a much more restricted category of subject matter. Cursive consideration of the some ninety cases annually in which the Court of Military Appeals renders signed opinions reveals no preponderance of cases presenting issues of law of greater significance from servicewide and individual standpoints.

7. Whatever the motivation underlying the action of the Court of Military Appeals in granting review as it did, and disposing of the case as it did, the salient fact remains that it *did* grant the petition for review, and in so doing conferred certiorari jurisdiction upon this Court. It is respectfully requested that review upon writ of certiorari be granted in this case in order that individual members of the United States Armed Forces may know that they retain essential protections of the Constitution, and that counsel rep-

resenting such individual members may be assured that theirs is a substantive role subject to record evaluation, and not a staged histrionic display in a mock contest of which the end result must invariably be according to the script.

8. An unsigned copy of a certificate of service accompanying the Brief in Opposition indicates that copies thereof were mailed to Counsel for Petitioner on 7 March 1986. Copies were in fact delivered by mail to counsel on the late afternoon of Saturday, March 15th, contained in a Department of Justice envelope bearing no postmark.

CONCLUSION

The instant petition presents an ideal vehicle for providing guidance to both the military community and the legal community concerning the proper function of military review and appellate tribunals in cases of prosecutions for alleged common law crimes which present constitutional issues, as well as for construction of the amendments respecting review of court-martial action effected by the Military Justice Act of 1983. Review upon writ of certiorari is also available to the Government under that Act, and requirement of disposition upon the record of presented constitutional issues could provide both a deterrent and facilitated corrective action in a future situation in which an unsound constitutional interpretation or application in favor of an individual might pose a threat to penal law enforcement both in and out of the Armed Forces. In the instant case, grant of review upon certiorari will serve the interests of justice to the individual Petitioner as well as the general public concerns with sound morale in the Armed Forces and the overall system of criminal justice in the United States.

Respectfully submitted.

HOMER A. WALKUP
Attorney at Law
2501 Ridge Road Drive
Alexandria, VA 22302
(703) 836-8281

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